Stephen Andrew Brown & Ors v Menteri Sumber Manusia, Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R1–25–64 OF 1999
RAUS SHARIF J
11 JUNE 2003

Labour Law *— Code of Conduct for Industrial Harmony — Whether a legally enforceable document*

Labour Law *— Industrial Court — Discretion of Minister — Circumstances when exercise of such discretion may be interfered with*

Labour Law *— Industrial Court — Discretion of Minister — Whether discretion properly exercised*

Labour Law *— Industrial Court — Reference by Minister — Discretion of Minister to refer case to Industrial Court — Circumstances when exercise of such discretion may be interfered with*

Labour Law *— Industrial Court — Reference by Minister — Whether Minister obliged to consider facts and merits of the case in deciding whether to refer — Whether Minister in going into facts of case and deciding not to refer case to Industrial Court not usurped the function of the Industrial Court — Whether Minister in going into facts of case and deciding not to refer case to Industrial Court acted outside scope of the Industrial Relations Act 1967*

The applicants' services were terminated with one month's notice as a result of the second respondent's closure of operations in Malaysia. The applicants made representations to the Director General of Industrial Relations ('the DGI') under s 20(1) of the Industrial Relations Act 1967 ('the Act'). As there was no likelihood of the representations being settled, the DGI notified the Minister of Human Resources ('the Minister'). The Minister declined to refer the matter to the Industrial Court under s 20(3) of the Act. The applicants thus applied for certiorari to quash the decision of the Minister not to refer the matter and for mandamus requiring the Minister to refer the matter to the Industrial Court. The applicants contended that the Minister acted in excess of and/or without jurisdiction in that: (a) he exceeded the scope of s 20(3) of the Act by deciding on the dispute and usurping the functions of the Industrial Court; (b) his decision was purely administrative and he should have referred the representations which were not frivolous and vexatious; (c) he failed to give effect to the objective and purpose of the Act; (d) he acted irrationally or unreasonably in failing to have regard to the fact that: (i) the applicants had been discriminated against by the second respondent; (ii) the second respondent had failed to comply with the Code of Conduct of Industrial Harmony; (iii) the Industrial Court

could have awarded compensation in lieu of reinstatement; and (e) the Minister had failed to consider that the applicant had questioned the bona fides of the second respondent's action and the second respondent had acted arbitrarily and capriciously. A

Held, dismissing the application with costs: B

(1) Not referring the applicants' representations to the Industrial Court did not necessarily mean that the Minister exceeded his jurisdiction or usurped the Industrial Court's function. The law confers a wide discretionary power to the Minister. The Minister when considering whether to make a reference or not, is obliged to consider the facts and merits of the case (see p 255F–G); *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9 followed. In the instant case, the Minister in going into the facts of the case and in making a decision not to refer the case to the Industrial Court did not usurp the function of the Industrial Court nor did he act outside the scope of the Act (see p 255H–I). C D

(2) Even if a representation is not frivolous or vexatious, it does not necessarily mean that the Minister has to refer it to the Industrial Court (see p 256A–B); *Booi Kim Lee v Menteri Sumber Manusia & Anor* [1999] 3 MLJ 515 referred. The exercise of discretion by the Minister can only be interfered with if the Minister (i) misdirects himself in law; (ii) takes into account irrelevant matters; (iii) fails to take relevant matters into account; or (iv) his decision militates against the object of the statute. Thus frivolous and vexatious claims are not the only grounds for non-reference (see p 256E–F). E F

(3) The Minister has a clear discretion whether to make a reference or not. The contention by the applicants that the Minister acts in a purely administrative capacity and not entitled to adjudicate on the matter is devoid of any merit. To accept such a contention would put the position of the Minister vis-à-vis the Act as an intermediary or a mere postman. That is not the intention of the Act (see p 256H–I). G

(4) The allegation of discrimination was without basis. The applicants were not in the same position as the local employees. They were expatriates employed on fixed term contracts and their continued employment was duly subjected to work permit approvals. Their employment was clearly intended to be on a temporary basis. Their remuneration under the contracts was extremely generous as compared to the local employees. There was no basis for comparing themselves with the local employees. The Code of Conduct of Industrial Harmony imposed no legal or contractual obligation on the second respondent. The Code has no legal force or sanction (see p 257B–C, E–F); *Penang & S Prai Textile & Garment Industry Employees' Union v Dragon Phoenix Bhd* H I

Penang & Anor [1989] 1 MLJ 481 followed. There were no provisions in the applicants' contracts for the payment of termination benefits. Thus the question of the applicants being paid compensation in lieu of reinstatement did not arise at all. They were paid all they were contractually entitled to. The basis of the Minister's non-reference was that the applicants' employer — the second respondent — had ceased operations in Malaysia and had sold its shares. It was therefore incorrect to assert that compensation in lieu of reinstatement was a relevant factor that the Minister had failed to take into consideration (see pp 257G–258A).

(5) On the facts, the second respondent could not be said to have acted arbitrarily and capriciously. Also, without any evidence, the allegation by the applicants that the Minister had failed to consider the bona fides of the second respondent's action and had acted arbitrarily and capriciously remained a mere allegation. The High Court was of the view that the Minister in reaching his decision did not commit any error which would have warranted an interference by way of judicial review (see pp 258A–B, D, I–259A); *Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998] 1 MLJ 305 followed. The applicants' application should therefore be dismissed with costs (see p 259A).

[Bahasa Malaysia summary

Perkhidmatan-perkhidmatan pemohon-pemohon telah ditamatkan dengan notis satu bulan akibat daripada penutupan operasi-operasi responden kedua di Malaysia. Pemohon-pemohon telah membuat representasi-representasi kepada Ketua Pengarah Perhubungan Perusahaan ('KPPP') di bawah s 20(1) Akta Perhubungan Perusahaan 1967 ('Akta tersebut'). Oleh kerana tiada kemungkinan representasi-representasi tersebut dapat diselesaikan, KPPP telah memaklumkan Menteri Sumber Manusia ('Menteri tersebut'). Menteri tersebut enggan untuk merujuk perkara tersebut kepada Mahkamah Perusahaan di bawah s 20(3) Akta tersebut. Pemohon-pemohon dengan itu telah memohon certiorari untuk membatalkan keputusan Menteri tersebut yang tidak merujuk perkara tersebut dan untuk mandamus yang menghendaki Menteri tersebut merujuk perkara tersebut ke Mahkamah Perusahaan. Pemohon-pemohon menegaskan bahawa Menteri tersebut telah bertindak melampaui dan/atau tanpa bidang kuasa di mana: (a) beliau telah melampaui skop s 20(3) Akta tersebut dengan membuat keputusan tentang pertikaian tersebut dan merampas fungsi-fungsi Mahkamah Perusahaan; (b) keputusan beliau adalah semata-mata tugas tadbir dan beliau sepatutnya merujuk representasi-representasi tersebut yang tidak remeh dan menyusahkan; (c) beliau telah gagal untuk melaksanakan objektif dan tujuan Akta tersebut; (d) beliau telah bertindak tidak rasional atau tidak munasabah apabila gagal untuk

mengambilkira fakta bahawa: (i) pemohon-pemohon telah didiskriminasikan oleh responden kedua; (ii) responden kedua telah gagal untuk mematuhi Code of Conduct of Industrial Harmony; (iii) Mahkamah Perusahaan boleh mengawardkan pampasan sebagai ganti pengembalian jawatan; dan (e) Menteri tersebut telah gagal untuk menimbangkan bahawa pemohon telah mempersoalkan bona fides tindakan responden kedua dan responden kedua telah bertindak sewenang-wenangnya dan tidak menentu.

Diputuskan, menolak permohonan tersebut dengan kos:

(1) Dengan tidak merujuk representasi-representasi tersebut kepada Mahkamah Perusahaan tidak semestinya bermakna Menteri tersebut telah melampaui bidang kuasa beliau atau telah merampas fungsi Mahkamah Perusahaan. Undang-undang memberikan Menteri tersebut apabila menimbangkan sama ada untuk membuat rujukan atau tidak, diwajibkan menimbangkan fakta-fakta dan merit-merit kes (lihat ms 255F–G); *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9 diikut. Dalam kes semasa, Menteri tersebut semasa meneliti fakta-fakta kes dan membuat satu keputusan untuk tidak merujuk kepada Mahkamah Perusahaan tidak merampas fungsi Mahkamah Perusahaan maupun beliau telah bertindak di luar skop Akta tersebut (lihat ms 255H–I).

(2) Walaupun satu representasi tidak remeh atau menyusahkan, itu tidak semestinya bermakna Menteri tersebut perlu merujuknya kepada Mahkamah Perusahaan (lihat ms 256A–B); *Booi Kim Lee v Menteri Sumber Manusia & Anor* [1999] 3 MLJ 515 dirujuk. Penggunaan budi bicara Menteri tersebut hanya boleh diganggu jika Menteri tersebut: (i) telah salah arah dalam undang-undang; (ii) telah mengambilkira perkara-perkara yang tidak relevan; (iii) telah gagal untuk mengambilkira perkara-perkara relevan; atau (iv) keputusan beliau menyekat objektif statut tersebut. Oleh itu tuntutan remeh dan menyusahkan bukan sahaja alasan-alasan untuk tidak merujuk (lihat ms 256E–F).

(3) Menteri tersebut mempunyai budi bicara yang jelas sama ada untuk membuat satu rujukan atau tidak. Hujah oleh pemohon-pemohon bahawa Menteri tersebut bertindak semata-mata dalam kapasiti tugas tadbir sahaja dan tidak berhak mengadili perkara tersebut tidak mempunyai apa-apa merit. Untuk menerima hujah sedemikian akan meletakkan Menteri tersebut vis-à-vis Akta tersebut sebagai perantara atau penyampai sahaja. Itu bukanlah niat Akta tersebut (lihat ms 256H–I).

(4) Pengataan diskriminasi adalah tanpa asas. Pemohon-pemohon bukan dalam kedudukan yang sama seperti pekerja-pekerja tempatan. Mereka adalah ekspatriat yang diambil bekerja berdasarkan kontrak-kontrak bertempoh tetap dan pekerjaan

berterusan mereka adalah tertakluk kepada kelulusan permit bekerja. Perkerjaan mereka dengan jelas bertujuan untuk tempoh sementara sahaja. Gaji mereka di bawah kontrak-kontrak tersebut adalah banyak dibandingkan dengan pekerja-pekerja tempatan. Tiada asas untuk membandingkan diri mereka dengan pekerja-pekerja tempatan. Code of Conduct of Industrial Harmony tidak mengenakan apa-apa kewajipan di sisi undang-undang atau kontraktual ke atas responden kedua. Kod tersebut tiada kuasa di sisi undang-undang atau sanksi (lihat ms 257B–C, E–F); *Penang & S Prai Textile & Garment Industry Employees' Union v Dragon Phoenix Bhd Penang & Anor* [1989] 1 MLJ 481 diikut. Tiada peruntukan dalam kontrak-kontrak pemohon-pemohon untuk bayaran faedah-faedah penamatan. Oleh itu persoalan tentang pemohon-pemohon dibayar pampasan menggantikan pengembalian jawatan tidak pernah timbul. Mereka dibayar seperti yang mereka berhak menerima di bawah kontrak. Asas ketiadakrujukan Menteri tersebut adalah bahawa majikan pemohon-pemohon — responden kedua — tidak lagi beroperasi di Malaysia dan telah menjual saham-sahamnya. Oleh itu ia adalah salah untuk menegaskan bahawa pampasan sebagai menggantikan pengembalian jawatan adalah satu faktor yang relevan di mana Menteri tersebut telah gagal untuk mempertimbangkan (lihat ms 257G–258A).

(5) Berdasarkan fakta-fakta, responden kedua tidak boleh dikatakan telah bertindak sewenang-wenangnya dan tidak menentu. Juga, tanpa apa-apa keterangan, pengataan oleh pemohon-pemohon bahawa Menteri tersebut telah gagal untuk menimbangkan bona fides tindakan sewenang-wenangnya dan tidak menentu kekal sebagai satu pengataan sahaja. Mahkamah Tinggi berpendapat bahawa Menteri tersebut dalam membuat keputusan tidak melakukan apa-apa kekhilafan yang akan mewarankan satu campur tangan melalui kajian semula kehakiman (lihat ms 258A–B, D, I–259A); *Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998] 1 MLJ 305 diikut. Permohonan pemohon-pemohon oleh itu sepatutnya ditolak dengan kos (lihat ms 259A).]

Notes

For cases on the discretion of the Minister, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1220–1233.

For cases on the reference by the Minister, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1311–1314.

Cases referred to

Booi Kim Lee v Menteri Sumber Manusia & Anor [1999] 3 MLJ 515 (refd)

Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor [1998] 1 MLJ 305 (folld)
Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9 (refd)
Penang & S Prai Textile & Garment Industry Employees' Union v Dragon Phoenix Bhd Penang & Anor [1989] 1 MLJ 481 (folld)

Legislation referred to

Industrial Relations Act 1967 s 20(1), (3)

V Malini (*P Kuppusamy & Co*) for the applicants.
Mohamad Naser bin Desa (Attorney General's Chambers) for the first defendant.
Sivabalah (*Shearn Delamore & Co*) for the second defendant.

Raus Sharif J: This is an application for an order of certiorari to quash the decision of The Honourable Minister of Human Resources ('the Minister') who has refused to refer for adjudication to the Industrial Court representations made by the applicants under s 20(3) of the Industrial Relations Act 1967 ('the Act') and an order of mandamus requiring the Minister to refer the representation to the Industrial Court.

The applicants were all expatriates under the employment of the second respondent. The applicants' employment details with the second respondent are as follows:

Applicants	Positions	Date of Commencement	Date of Termination	Date of Expiry of Contract
Stephen Andrew Brown	Senior Facilities Engineer	19 October 1994	4 September 1998	31 December 1999
Arthur James Pobjoy	Production Advisor	2 January 1997	4 September 1998	31 December 1999
George Edward Hallam	Senior Pipeline Engineer	1 May 1994	4 September 1998	31 December 1999
Peter Charles King	Senior Planning Supervisor	11 April 1994	4 September 1998	31 December 1999
Geoffrey Wallace Bruce	Project Commercial Analyst	13 April 1994	4 September 1998	31 December 1999

By identical letters dated 5 August 1998, the applicants' services were terminated with one-month's notice arising out of the closure of the second respondent's operation in Malaysia. The applicants then made representations to the Director General of Industrial Relations under

A s 20(1) of the Act. As no settlement was reached, the matter was referred to the Minister for his decision under s 20(3) of the Act. The Minister on 26 April 1999, decided not to refer the matter to the Industrial Court.

The applicants in their application contend that the Minister had acted in excess of and/or without jurisdiction in that:

B (a) he exceeded the scope of s 20(3) of the Act by deciding on the dispute and usurping the functions of the Industrial Court;

(b) the Minister's decision was purely administrative and he should have made the reference, which was not frivolous and vexatious;

C (c) he failed to give effect to the objective and purpose of the Act;

(d) he acted irrationally or unreasonably in failing to have regard to the fact that:

(i) the applicants had been discriminated against by the second respondent;

D (ii) the second respondent had failed to comply with the Code of Conduct of Industrial Harmony; and

(iii) the Industrial Court could have awarded compensation in lieu of reinstatement.

(e) the Minister had failed to consider that the applicant had questioned E the bona fides of the second respondent's action and the second respondent had acted arbitrarily and capriciously.

The Minister usurping the Industrial Court's function

F I am unable to agree to the applicants' first ground of challenge in that, by not making the reference, the Minister had usurped the Industrial Court's function by purporting to adjudicate on the dispute. By not referring the applicants' representations to the Industrial Court, it does not necessarily mean that the Minister has exceeded his jurisdiction or usurping the Industrial Court's function. This is because the law conferred a wide G discretionary power to the Minister. The Minister when considering whether to make a reference or not, is obliged to consider the facts and the merits of the case. That is the position of the law as clearly stated by Hashim Yeop A Sani CJ (Malaya) in *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9 at p 10 in the following terms:

H > There is no question that the power of the Minister under s 22(3) of the Act is wide and the language used by the legislation would seem to confer on the Minister a wide discretionary whether to refer or not to refer to the Industrial Court depending on the facts of each case ... .

Thus, the applicants' contention that the Minister could not go into the merits of the case is clearly unsustainable in law. To me, the Minister in I going into the facts of the case, and in making a decision not to refer the case to the Industrial Court, did not usurp the function of the Industrial Court nor did he act outside the scope of the Act.

Representation not frivolous and vexatious

The applicants contended that the dispute between them and the second respondent is not frivolous or vexatious and it is incumbent upon the Minister to refer the dispute to the Industrial Court. With respect, I am unable to agree. I am of the view that eventhough the representation is not frivolous or vexatious, it does not necessarily mean the Minister has to refer every representation to the Industrial Court. In the case of *Booi Kim Lee v Menteri Sumber Manusia & Anor* [1999] 3 MLJ 515, KC Vohrah J (as he then was) at p 525 said:

> But trivial, frivolous or vexatious complaints are not the only grounds on which the Minister may refuse to refer the representation to the Industrial Court. Put it conversely if the complaint is neither trivial, nor frivolous or vexatious, the Minister may still refuse to refer the representation.

The position of the law has had earlier been clarified by Hashim Yeop A Sani CJ (Malaya) in *Lie Seng Fatt* whereby at p 12 he said:

> ... so long as he exercise the discretion without improper motive, the exercise of discretion must not be interfered with by the Court unless he had misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute.

It is clear from the foregoing passage, of Hashim Yeop A Sani CJ (Malaya) has never stated that, unless the representation were frivolous or vexatious, the matter must be referred to the Industrial Court. From the very passage it is clear that the exercise of discretion by the Minister could only be interfered with if the Minister: (i) misdirected himself in law; (ii) took into account irrelevant matters; (iii) failed to take relevant matters into account; or (iv) his decision militates against the object of the statute. Thus, it is my view that frivolous and vexatious claims are not the only grounds for non-reference. So long as the Minister has not committed any error as being highlighted above, his exercise of discretion cannot be challenged.

Failed to give effect to the objective and purpose of the Act

It is the submission of the applicants that the Minister acts in a purely administrative capacity and by not referring the applicants' case to the Industrial Court, the Minister had failed to give effect to the objective and purpose of the Act. With respect, that is not the position of the law. The position of the law is that the Minister has a clear discretion whether to make a reference or not. The contention by the applicants that the Minister acts in a purely administrative capacity and not entitled to adjudicate on the matter is devoid of any merit. To accept such contention would put the position of the Minister vis-à-vis the Act as an intermediary or a mere postman. Surely that is not the intention of the Act.

The Minister acted irrationally and unreasonably and failure to consider relevant matters

Discrimination

The applicants contended that they were not being paid severance payments like the local employees. Thus, they alleged they were being discriminated. However, it is apparent that the allegation of discrimination is without basis. This is due to the fact that the applicants were not in the same position as the local employees. They were expatriates employed based on fixed term contracts and their continued employment was duly subjected to work permit approvals. Their employment was clearly intended to be on a temporary basis. Moreover, their remuneration under the contracts was extremely generous as to be compared to local employees. Hence, there is no basis for comparing themselves with the local employees. To me, the complaint by the applicants is something whereby they are neither legally nor contractually entitled to.

Code of Conduct of Industrial Harmony

The contention of the applicants is that there has been a breach of Code of Conduct of Industrial Harmony ('the Code'). The Code which is entered between Malaysia Council of Employer's Organisation and Malaysia Trade Union Congress in 1975, lay down certain guidelines that should be followed in carrying out retrenchment exercise. The applicants, in particular, are referring to cll 20 to 24 of the Code. The complaint is that the Minister erred in law in failing to take into account, the breach of the Code in that the second respondent did not consult the applicants before terminating their services especially in light of the fact that their contract was not due to be expired yet. However, apparently to me, the Code imposes no legal or contractual obligation on the second respondent. In the case of *Penang & S Prai Textile & Garment Industry Employees' Union v Dragon Phoenix Bhd Penang & Anor* [1989] 1 MLJ 481, Mohamed Yusoff J held that the Code has no legal force or sanction.

Compensation in lieu of reinstatement

The applicants contended that the Industrial Court could have awarded compensation in lieu of reinstatement in light of the fact that the second respondent is no longer in operation and this is a relevant factor of which the Minister has failed to take into account. But it is clear that there were no provisions in the applicants' contracts for the payment of termination benefits. So the question of the applicants to be paid compensation in lieu of reinstatement does not arise at all. They have been paid accordingly and as they were contractually entitled to and this includes the payment of completion bonuses. In any event, the Minister has never declined to make a reference on the basis that the Industrial Court has no power to order compensation in lieu of reinstatement. The basis of non-reference was that the applicants' employer had ceased operations in Malaysia and had sold its shares to Shell Oil and Gas. It is therefore, incorrect to assert that

compensation in lieu of reinstatement was a relevant factor that the Minister had failed to take into consideration. A

Bona fides of the second respondent's action

On the facts of this case, the second respondent cannot be said to have acted arbitrarily and capriciously. There is no dispute in this case of a fact that the B applicants were all employed by the Occidental Group of Companies to undertake the operation of the Group in Malaysia through the second respondent. It is not being disputed that the Occidental Group had ceased all its operations in Malaysia and diversified its share in the Malaysian operation to the Royal Dutch Shell Group of Companies. It is also not being C disputed that the services of all employees, including the applicants were being terminated and the Royal Dutch Shell Group of Companies did not engage anybody to replace the terminated employees. In light of the complete closure of operations in Malaysia, the termination of the applicants' services in Malaysia is clearly inevitable. Nevertheless, the genuineness of the closure of the company had been raised as an issue by D the applicants. But the applicants failed to show any evidence of support. Without any evidence, the allegation by the applicants that the Minister had failed to consider that the applicants had questioned the bona fide of the second respondent's action and had acted arbitrarily and capriciously remain a mere allegation. Contrary to what had been alleged by the applicants, the Minister had in fact, taken into account relevant factors in E arriving at his decision. In his affidavit, the Minister averred that in reaching his decision, he has duly considered all the facts from the applicants' representation together with the materials presented in the reconciliation process. He took notice that the termination was not only done to the applicants but also to the local workers and the compensation given to the local workers were much lower as compared to the amount received by the F applicants.

Thus, based on the facts of this case, this court is not going to be trigger happy to interfere with the decision of the Minister merely on allegations that the Minister had acted arbitrarily and capriciously bearing in mind that this court is not sitting in its appellate jurisdiction. The function of the High G Court particularly in this type of application is well said in the Court of Appeal case of *Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998] 1 MLJ 305 at p 309, where it is stated that:

> First and foremost it must be emphasized that in an application for certiorari, the High Court is not sitting in its appellate jurisdiction but in its supervisory H jurisdiction. The court is more concerned with the decision-making process and not on the decision itself. The court should not readily question the administrative decision of the first respondent as that is his absolute discretion. If the first respondent had acted ultra vires, unfairly or unjustly in exercising his discretion, then it is the duty of the courts to interfere in an application for review of that decision. I

In conclusion, I am of the view that the Minister in reaching his decision did not commit any error which would have warranted an interference by way

of judicial review. In the circumstances, the applicants' application is hereby dismissed with costs.

Application dismissed with costs.

Reported by Andrew Christopher Simon